

WEBINAR WEDNESDAYS



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HOW TO ADMIT SCIENTIFIC RESULTS USING A SUBSTITUTE EXPERT

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Rogovich Tip Sheet - using a substitute expert & responding to objections to not calling everyone involved in the testing as a witness

NOTE: if you call a substitute expert, you WILL NOT admit the testing analyst's written report. You get the reading in orally through the opinion of the testifying expert. The key concept is that the testifying expert must be able to form his/her own opinion regarding the test results from the review of the notes, printouts, etc. He/she will testify to his/her opinion. He/she cannot be a mere conduit for the opinion of the non-testifying analyst. By doing it this way, you have produced the witness who is giving the opinion you are relying on. The defense is free to cross-examine and confront this witness. They can ask how it is that the witness can form his/her own opinion when he/she did not conduct the analysis. There simply is no confrontation nor hearsay issue.

Be sure to interview your witness to make certain he/she can form his/her own opinion regarding the test results from the review of the notes, printouts, etc. and remind him/her again before he/she testifies that he/she can only testify to his/her own opinion. He/she cannot merely testify that the testing criminalist found ___ BAC or ___ drugs, etc.

Be sure to disclose the testifying witness, all notes, reports and documents he/she will rely on and his/her opinion. Criminal Procedure Rule 15.1(b)(4); *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

Sample Question Areas – these are not all inclusive, modify as needed

Bring out the testifying expert's qualifications and expertise

- Job description, years of experience
- Education and training
- Any relevant previous job experience
- General qualifications
- Specific qualifications for conducting the analysis done in this case
- DPS and/or other permits
- Keeps up to date with publications in the field
- How many times has he/she conducted this type of analysis?
- Is it part of his/her job responsibilities?
- Does he/she supervise this type of analysis (if applicable)?
- Does he/she train others to conduct this type of analysis (if applicable)?
- Does he/she confirm these types of analysis in the lab after they are conducted?

Sample Question Areas Cont.

- Did he/she confirm this particular analysis (if applicable)? [If not, bring out if it is lab protocol for someone else to confirm the analysis and that that happened in this case.]

You may want to bring out information regarding the qualifications of the expert that conducted the analysis but who is not available. (This is not required – the testing criminalist does not have to be either qualified or an expert. *State v. Rogovich*, 188 Ariz. 41, 932 P.2d 794, 797 (1997); *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014). Bringing out the qualifications of the testing expert does, however, tend to increase the confidence the jury has in the evidence.)

Examples include:

- The relationship between the missing analyst and the testifying expert (i.e. the testing analyst was trained by the testifying expert, supervised by, worked with, etc.)
- Establish that the testifying expert is familiar with the missing analyst's work/procedures used to test this type of evidence and is familiar with the fact that the missing criminalist follows proper scientific procedure. (He/she may have reviewed the testing criminalist's work in the past.)
- The missing analyst's job description in the crime lab required him/her to conduct these tests on a regular basis
- The missing analyst's qualifications – if known

During a motion hearing, you may want to bring out the safeguards and protocols of the lab – especially chain of custody protocols. During trial, you certainly will need to. If the testifying expert did any reviews of the non-testifying expert's work, be sure to emphasize that point.

Have the witness testify to the lab's quality assurance for this type of testing

Lay foundation (examples)

- Show the witness the notes and printouts and ask: "what are they?"
- From your review of this exhibit, can you tell what scientific method was used to conduct the analysis in this case?
- What method was used?
- Describe this method.
- Is this method accepted in the relevant scientific community as a valid method of testing _____ insert your type of evidence/testing?

Sample Question Areas Cont.

- Discuss chain of custody
- Describe what was done in this case.
- How is it that you can form your own opinion regarding these test results?
- Based on your review of the procedure used to analyze the sample, the test results, and records, do you have an opinion as to whether the accepted technique was properly used?
- What is that opinion?
- Based on your review of the procedure used to analyze the sample, the test results, and records, do you have an opinion as to whether the readings are an accurate measurement and recording of _____ [For example: the presences of drugs (or metabolite) in the defendant's system?]
- What is that opinion?
- What was found in the sample? [For example: Defendant's urine (blood) sample?]

Note – Some old school judges may require you to ask the following question, it was not required even under *Deason*.

- Would these test results be accepted in the relevant scientific community as valid test results?

This list is not all inclusive. See Toxicologist and Rule 702/*Daubert* list of predicate questions/scripts for other potential areas of questioning.

Not Calling Everyone Involved in the Testing as a Witness

The analysis and procedures are basically the same for using a substitute expert as they are for responding to objections for not calling all analysts and technicians involved in the testing. The bottom line is the witness you do call must be able to form and testify to his/her own opinion regarding the test results based on the notes, printouts, etc. from the testing. If challenged, have the expert testify that he/she can form his/her opinion and why he/she can do it even though he/she did not conduct all of the testing him/herself.

State v. Gomez, 226 Ariz. 165, 244 P.3d 1163 (2010) is a particularly good opinion for this situation.

Not Calling Everyone Involved in the Testing as a Witness (cont.)

The defense is free to cross-examine and confront this witness. The defense can ask how it is that the witness can form his/her own opinion when he/she did not conduct all of the analysis. There simply is no confrontation nor hearsay issue.

Be sure to interview your witness to make certain he/she can form his/her own opinion regarding the test results from the review of the notes, printouts, etc. and remind him/her again before he/she testifies that he/she can only testify to his/her own opinion.

Be sure to disclose the testifying witness, all notes, reports and documents he/she will rely on and his/her opinion. Criminal Procedure Rule 15.1(b)(4); *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

The sample question areas above for using a substitute expert should assist you to develop questions for this scenario.

Quick Legal References:

General

It is the *State v. Rogovich*, 188 Ariz. 38, 932 P.2d 794 (1997) line of cases that establishes we can do this. If the testifying witness is able to form his/her own opinion and testifies to that opinion, there is no Confrontation Clause issue. *State v. Smith*, 215 Ariz. 221, 229, 159 P.3d 531 (2007); *State v. Tucker*, 215 Ariz. 298, 160 Ariz. 177 (2007); *State v. Dixon*, 226 Ariz. 545, 250 P.3d 226 (2011); *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010); *State v. Joseph*, 230 Ariz. 296, 283 P.3d 27 (2012), and *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014). There is, likewise, no hearsay issue.

Case on point for blood BAC testing: *State v. Karp* (*Voris*, Real Party in Interest) 236 Ariz. 120 (App. 2014).

Quick Legal References Cont.

Even after the US Supreme Court *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004) line of cases, the Arizona Supreme Court has consistently ruled that as long as the testifying expert forms and testifies to his own opinion, there is no Confrontation Clause problem because the defense is free to cross-examine our witness regarding his/her opinion.

The most recent pronouncement by the Arizona Supreme Court is *Joseph, supra.* which is post- *Bullcoming v. Mexico*, 131 S.Ct. 2705 (2011). *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 221, 183 L.Ed.2d 89 (2012), is the most recent US Supreme Court opinion. The most recent court of appeals opinions are *Karp, supra.* and *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014).

NOTE: in *Williams v. Illinois*, the US Supreme Court upheld the admission of the testimony. Moreover, in *Crawford*, which will be relied upon by the defense, they specifically stated:

. . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. . .)

Crawford, at 59, 124 S.Ct. 1354, 1369 FN9.

Chain of Custody

The US Supreme Court indicated chain of custody is not an issue in these cases merely because the State does not call the testing expert to testify. *See, Melendez-Diaz v. Mass.*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 FN1 (2009)(Everyone relevant to establishing chain of custody or authenticity of sample does not have to appear. Gaps in the chain go to weight not admissibility.) *State v. Gomez*, 226 Ariz. 165, 244 P.3d 1163 (2010) is also a good resource for chain of custody issues in these cases.

Challenges to the chain of custody go to the weight, not the admissibility of the evidence. *State v. Morales*, 170 Ariz. 360 (App. 1991).

Quick Legal References Cont.

Hearsay

The testifying expert is giving his/her own opinion. It is not hearsay. *State v. Lundstrom*, 161 Ariz. 141, 148 (1989).

The report, notes, data, etc. used by the testifying expert to form his/her opinion is not hearsay because it is not used to prove the truth of the matter asserted. Evidence Rule 802(2)(c)(2). The data is used solely as a basis for the testifying expert's opinion and not to prove the truth of the matter asserted. *Rogovich*, at 42, 932 P.2d at 798.

Remember, the reports, notes and data themselves are not being admitted. We do this to avoid hearsay and confrontation issues. They are only being used by the expert to form the basis of what is being admitted – the opinion of the expert.

Distinguishing Defense Case Law

None of the opinions the defense will cite (*Crawford v. Washington*, *Bullcoming v. New Mexico*, *Williams v. Illinois*, *State v. Smith*, etc.) will address our method – where the testifying expert has formed his/her own opinion and testifies to that opinion.

In all of the opinions the defense will try to rely on, the report was admitted. We will not admit the report. In those cases, the testifying witness was a conduit for admitting the opinion of the testing analyst. Our method does not do that.

***State v. Moss*, – Depublished!**

Occasionally, the defense will erroneously cite to *State v. Moss*, 215 Ariz. 385, 160 P.3d 1143 (App. 2007) for the proposition that allowing one expert to review the analysis performed by another and then form his/her own opinion does violate the Confrontation Clause. This ignores the fact, however, that this opinion was depublished by the Arizona Supreme Court in *State v. Moss*, 217 Ariz. 320, 173 P.3d 1021 (2007).